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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LUCINDA MARIE PIERCE, Appellant.	2 CA-CR 2007-0107 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053435

Honorable Stephen C. Villarreal, Judge

AFFIRMED IN PART AND VACATED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 In this appeal, appellant Lucinda Marie Pierce challenges the sufficiency of the evidence supporting her conviction of aggravated driving under the influence of an intoxicant (DUI). She also argues that her conviction of two counts of misdemeanor DUI, which arose out of the same incident, violated principles of double jeopardy and must therefore be vacated. We vacate the aggravated DUI conviction and one of the misdemeanor convictions for the reasons set forth below.

Factual and Procedural Background

¶2 Police arrested Pierce on suspicion of DUI on March 11, 2005. She was charged with four felonies: aggravated DUI with a suspended license (count one); aggravated driving with an alcohol concentration of .08 or more with a suspended license (count two); aggravated DUI with two or more prior DUI convictions (count three); and aggravated driving with an alcohol concentration of .08 or more with two or more prior DUI convictions (count four).

¶3 At trial, the state presented official records of the prior convictions, which reflected Pierce had pled guilty to DUI, in violation of A.R.S. § 28-1382(A), once on September 29, 2004, and again on November 23, 2004. The records do not indicate the dates on which Pierce committed these DUI offenses, and it appears from the record on appeal that the state did not present any other evidence establishing the date of the offenses.

¶4 The jury found Pierce guilty of count four but acquitted her of the principal charges in counts one, two, and three. The jury also found Pierce guilty of the lesser-included offense in count two of misdemeanor driving with a blood alcohol concentration

(BAC) of .08 or more and the lesser-included offenses of misdemeanor DUI in counts one and three.[1] As to count four, the trial court sentenced Pierce to a four-month prison term with a five-year probationary term; on counts one, two, and three, the court ordered Pierce to serve a ten-day jail term.

Discussion

¶5 Pierce contends the state presented insufficient evidence to support the aggravated DUI conviction because the records it submitted to prove the prior DUI convictions did not include the date on which Pierce had committed the offenses. Although Pierce did not move for a judgment of acquittal on this precise ground, we nonetheless consider the merits of her argument because a conviction not sustained by sufficient evidence constitutes fundamental error. *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005).

¶6 "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *Id.* ¶ 6. "Substantial evidence is more than a mere scintilla"; it is evidence that would support a reasonable jury's conclusion that the defendant committed the charged offense beyond a reasonable doubt. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). A conviction lacks substantial evidence if the state failed to present any evidence of an element of the offense. *State v. Jannamon*, 169 Ariz. 435, 439-40, 819 P.2d 1021, 1025-26 (App. 1991).

[1]The trial court's sentencing minute entry erroneously identifies Pierce's conviction on count three as driving under the influence with a BAC of .08 or more.

¶7 At the time Pierce committed the current offenses, former A.R.S. § 28-1383(A)(2) provided that a person is guilty of aggravated DUI if:

> Within a period of sixty months [the person] *commits* a third or subsequent violation of section 28-1381, section 28-1382 or this section or is convicted of a violation of section 28-1381, section 28-1382 or this section and has previously been convicted of any combination of convictions of section 28-1381, section 28-1382 or this section or acts in another jurisdiction that if committed in this state would be a violation of section 28-1381, section 28-1382 or this section.

2004 Ariz. Sess. Laws, ch. 97, § 3 (emphasis added). Former § 28-1383(B) further provided, in pertinent part:

> The dates of the commission of the offenses are the determining factor in applying the sixty month provision provided in subsection A, paragraph 2 of this section regardless of the sequence in which the offenses were committed.

2004 Ariz. Sess. Laws, ch. 97, § 3.

¶8 Pierce argues, relying on former § 28-1383(B), that the crime of aggravated DUI based on prior DUI convictions required proof that the prior DUI offenses had been *committed* within sixty months of the commission of the current offense. The state counters that former § 28-1383(A)(2) contained alternative means of establishing the person had committed aggravated DUI, one of which was by showing the defendant had been *convicted* of two prior DUI offenses within sixty months of the present DUI conviction. Whether the state was required to prove the dates on which the other DUI offenses had been committed is a question of law and statutory interpretation, which we review de novo. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004).

¶9 When construing a statute, we look first to its plain language. *State v. Hollenback*, 212 Ariz. 12, ¶5, 126 P.3d 159, 161 (App. 2005). "[W]hen the plain language is unambiguous and conveys a clear and definite meaning, its plain and obvious meaning must be followed without resort to the rules of statutory interpretation." *City of Chandler v. Ariz. Dep't of Transp.*, 216 Ariz. 435, ¶ 6, 167 P.3d 122, 125 (App. 2007).

¶10 The language of § 28-1383(B) compels us to agree with Pierce that aggravated DUI based on prior DUI convictions requires proof of the dates of those offenses, not merely the dates of conviction. The express terms of former § 28-1383(B) provide the procedure for measuring the sixty-month period of time found in former § 28-1383(A)(2): "[t]he dates of the *commission* of the offenses are the determining factor in applying the sixty month provision provided in subsection A, paragraph 2." 2004 Ariz. Sess. Laws, ch. 97, § 3 (emphasis added). Thus, the legislature has designated commission of the prior offenses, not conviction for them, as the relevant event for purposes of § 28-1383(A)(2).

¶11 The state suggests that subsection (B)'s language was meant only to counteract the court's holding in *State v. Driggs*, 155 Ariz. 77, 78-79, 745 P.2d 135, 136-37 (1987)—namely, that prerequisite DUI offenses must have been committed before the date on which the defendant is alleged to have committed aggravated DUI. But the evolution of that provision does not lend credence to such a narrow reading. We acknowledge § 28-1383(B) was amended to provide that the sequence of DUI offenses is immaterial to an aggravated DUI charge. *See* 1988 Ariz. Sess. Laws, ch. 246, § 4 (amending statute to include relevant clause). And, that amendment likely was in response to the court's

conclusion in *Driggs* that "the sequence of the offenses . . . in D[U]I cases . . . is important." 155 Ariz. at 79, 745 P.2d at 137. However, the history of that provision demonstrates that the legislature did not intend to limit its application to the sequence of DUI offenses. Indeed, before *Driggs* was decided and the statute was amended, the pre-existing DUI statute also contained, in a separate subsection, operative language nearly identical to that in our current statute: "'[t]he dates of the commission of the offense are the determining factor in applying this subsection.'" *Id.* at 78, 745 P.2d at 136 (emphasis omitted), *quoting* 1987 Ariz. Sess. Laws, ch. 148, § 48 (former A.R.S. § 28-692.01(F)); *see also* A.R.S. § 28-1383(B).

¶12 Our understanding of the plain meaning of § 28-1383(B) is reinforced by the legislature's expression of a similar intent when providing for sentencing enhancement under Arizona's general sentencing statute for dangerous and repetitive offenders, A.R.S. § 13-604. Section 13-604(W)(2)(c) defines a "[h]istorical prior felony conviction," which will subject a defendant to enhanced sentence, to include "[a]ny class 4, 5 or 6 felony . . . that was *committed* within the five years immediately preceding the date of the present offense." (Emphasis added.) And, we have previously reversed an enhanced sentence sought under the provision when the record established only the date of the defendant's prior conviction—not the date of the underlying offense. *State v. Hickman*, 194 Ariz. 248, ¶¶ 1, 3, 980 P.2d 501, 502-03 (App. 1999).[2] Section 28-1383(B) is no less clear than § 13-

[2]At the time the case was decided, the language defining "historical prior felony conviction" was set forth in former A.R.S. § 13-604(U)(1)(c). 1998 Ariz. Sess. Laws, ch. 289, § 3.

604(W)(2)(c) in specifying that the commission of the aggravating offense is the relevant event when measuring time under the respective statutes.

¶13 Because there was no evidence of the date on which Pierce had committed the prior DUI offenses, there was insufficient evidence supporting the conviction on count four. *See Jannamon*, 169 Ariz. at 440, 819 P.2d at 1026 (reversing conviction of public sexual indecency to minor where state failed to establish age of victim at time of offense).[3]

¶14 Pierce also argues that the "redundant" convictions she received for the lesser-included offenses in counts one and three constitute double jeopardy, a point which the state concedes.[4] A defendant cannot twice be convicted of an identical offense as a result of a single act. *State v. Jones*, 185 Ariz. 403, 405, 916 P.2d 1119, 1121 (App. 1995). Yet the jury ultimately convicted Pierce in counts one and three of misdemeanor DUI, in violation of § 28-1381(A)(1), based upon a single incident of impaired driving. Because these

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[3]Normally, this court would remand Pierce's case for resentencing on the lesser-included offense in count four of driving with a BAC of .08 or more, in violation of A.R.S. § 28-1381(A)(2). *See, e.g., State v. George*, 206 Ariz. 436, ¶ 14, 79 P.3d 1050, 1056-57 (App. 2003) (modifying aggravated assault conviction and remanding case for resentencing on lesser-included assault offense). However, given that Pierce was convicted on count two of violating § 28-1381(A)(2), and because her convictions on counts two and four resulted from exactly the same conduct, principles of double jeopardy prevent this court from reducing her aggravated DUI conviction to an identical misdemeanor lesser-included offense or from subjecting her to multiple punishments for the same crime. *Cf. State v. Jones*, 185 Ariz. 403, 405, 407, 916 P.2d 1119, 1121, 1123 (App. 1995) (recognizing court's obligation, under double jeopardy clause, to vacate multiple convictions and sentences under same statutory provision when defendant's acts amount to single violation).

[4]We do not address Pierce's jeopardy argument relating to count two because our disposition of count four renders it moot. *See State v. Walden*, 126 Ariz. 333, 335, 615 P.2d 11, 13 (App. 1980).

multiplicitous convictions violate principles of double jeopardy, *see Merlina v. Jejna*, 208 Ariz. 1, ¶ 14, 90 P.3d 202, 205 (App. 2004), we vacate her conviction and sentence on count three.[5]

Conclusion

¶15 We vacate Pierce's convictions and sentences on counts three and four but affirm her convictions and sentences on count one for driving under the influence while impaired to the slightest degree and count two for driving with a BAC of .08 or more. We necessarily also vacate Pierce's five-year term of probation because that term could only be imposed as a result of the felony conviction on count four,[6] as well as all fines, fees, assessments, and surcharges imposed as a result of that conviction.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge

[5]A court typically vacates the "lesser" conviction that results in a double jeopardy violation. *See Jones*, 185 Ariz. at 407, 916 P.2d at 1123. In this case, however, Pierce received identical concurrent sentences for counts one and three.

[6]*See* A.R.S. § 28-1381(C) (violation of section is class one misdemeanor); A.R.S. § 13-902(A)(5) (up to three years' probation available for class one misdemeanor).